

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
(Fort Wayne Division)

_____)	
INTERNATIONAL TRUCK AND ENGINE)	
CORPORATION and)	
INTERNATIONAL TRUCK INTELLECTUAL)	
PROPERTY CO., LLC,)	Case No. 1:03 CV265
)	
Plaintiffs,)	
v.)	
)	
CATERPILLAR INC.,)	
)	
Defendant.)	
_____)	
)	
CATERPILLAR INC.,)	
)	
Counter-Plaintiff,)	
v.)	
)	
INTERNATIONAL TRUCK AND ENGINE)	
CORPORATION and)	
INTERNATIONAL TRUCK INTELLECTUAL)	
PROPERTY CO., LLC,)	
)	
Counter-Defendants)	
_____)	

**MEMORANDUM IN SUPPORT OF CATERPILLAR INC.'S MOTION TO STRIKE THE PORTIONS
OF PLAINTIFFS' EXPERT REPORTS ADDRESSING LATE DISCLOSED CLAIMS AND LATE
DISCLOSED PRODUCTS**

Caterpillar Inc. ("Caterpillar") respectfully submits this memorandum in support of its motion to strike the portions of the Expert Witness Report of Joseph Gemini and the Expert Report of Clark J. Radcliffe that address Caterpillar's alleged infringement of the five additional claims of the '177 Patent-in-Suit ("Newly Added Claims 32, 41, 42, 43, and 52") and the 34 additional Caterpillar products ("Newly Accused Products") Plaintiffs first asserted *two days* before the close of fact discovery.

ARGUMENT

These Newly Added Claims and Newly Added Products are the subject of Caterpillar's Motion to Preclude Plaintiffs From Asserting Late Disclosed Claims And From Accusing Late Disclosed Products, filed on April 15, 2004, and fully briefed as of May 12, 2004.

As Caterpillar set forth in both its opening Memorandum and in its Reply brief in support of its Motion, Plaintiffs should be precluded from asserting the Newly Added Claims and from including the Newly Accused Products in this litigation for at least the following reasons:

The delayed timing of Plaintiffs' assertion of the Newly Added Claims also deprived Caterpillar of the requisite notice of these claims to investigate, during the fact discovery period, any prior art specifically directed to the limitations set forth in the Newly Added Claims and to depose fact witnesses on such prior art.¹

As such, it would further prejudice Caterpillar to have its experts address the untimely Newly Added Claims and Newly Accused Products. Caterpillar should not have to have its experts refocus energies they would otherwise be spending on Plaintiffs' timely asserted claims to address the Newly Added Claims and Newly Accused Products. In addition, as discussed above, Caterpillar's experts would not have the benefit of any discovery regarding these new claims and products. Moreover, as Plaintiffs have failed to provide any evidentiary support for accusing the 34 the Newly Accused Products, Caterpillar's experts cannot even know the basis for Plaintiffs' infringement allegations.

¹ See Mem. at 7; Reply at 10-12.

CONCLUSION

For the foregoing reasons, Caterpillar respectfully requests this Court strike:

(1) the portions of Mr. Radcliffe's Expert Report that reflect his opinion for why Caterpillar infringes Newly Added Claims 32, 41, 42, 43 and 52 (namely portions of pages 5-7, 12-14, 20-21) and how the Newly Accused Products infringe any of the asserted claims of the '177 Patent (namely portions of pages 5-9, 12-16, 20-21); and

(2) the portions of Mr. Gemini's report that reflect his opinion that damages should be calculated based on a theory of infringement including the Newly Added Claims (namely portions of pages 5, 8-9) and related to the sale of the Newly Accused Products (namely portions of page 5-6; 9-10, 19).

Respectfully submitted,

S/John T. Menzie

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Dated: May ___, 2004

ATTORNEYS FOR
CATERPILLAR INC.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing CATERPILLAR'S MOTION TO STRIKE THE PORTIONS OF PLAINTIFFS' EXPERT REPORTS ADDRESSING LATE DISCLOSED CLAIMS AND OF ACCUSING LATE DISCLOSED PRODUCTS was served on May ____, 2004 on the following, via hand-delivery and first-class mail on:

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